

**SEP 28 2005**

**CATHY A. CATTERSON, CLERK**  
**U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

TRINIDAD VILLASENOR-VALDEZ,

Defendant - Appellee.

No. 04-30221

D.C. No. CR-03-00182-BLW

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Idaho  
B. Lynn Winmill, District Judge, Presiding

Submitted September 16, 2005<sup>\*\*</sup>  
Seattle, Washington

Before: SCHROEDER, Chief Judge, ALARCÓN and LEAVY, Circuit Judges.

Trinidad Villasenor-Valdez pled guilty to illegally reentering the United States after having been deported following his conviction for an aggravated

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. See Fed R. App. P. 34(a)(2).

felony. At sentencing, he received a sixteen-level enhancement because of a prior conviction for statutory rape, but was granted an eight-level downward departure from the enhancement. The Government appeals from the court's sentencing decision to grant a downward departure. It maintains that U.S.S.G. § 2L1.2(b)(1)(A) mandates the imposition of a sixteen-level enhancement. We affirm the sentencing decision, because the sentencing guidelines are not mandatory under *United States v. Booker*, 125 S. Ct. 738, 757 (2005).

Mr. Villasenor-Valdez pled guilty to illegally reentering the United States after having been deported following his conviction for an aggravated felony. At sentencing, he received a sixteen-level enhancement based on his prior conviction for statutory rape, a crime of violence. Mr. Villasenor-Valdez moved for a downward departure under U.S.S.G § 5k2.0. The Government opposed this motion, but the District Court granted an eight-level reduction. The Government challenges this reduction. "The interpretation and construction of statutes are questions of law reviewed de novo." *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1041 (9th Cir. 2001).

The Government argues that the District Court "render[ed] moot the sixteen level enhancement mandated by U.S.S.G. § 2L1.2(b)(1)(A) . . ." when it departed downward eight levels in this case. The Supreme Court ruled in *Booker* that the

Sentencing Guidelines are not mandatory. *Booker*, 125 S. Ct. at 756-57. Because this matter was pending on appeal when *Booker* was decided, this Court must apply that decision to this appeal. *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987). Therefore, the Government’s argument that a higher sentence was “mandated” by the Guidelines has no merit after *Booker*.

**AFFIRMED.**